No. 16309.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FRED STEIN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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I.

JURISDICTIONAL STATEMENT.

This is an appeal from a judgment of conviction by a jury on September 22, 1958, in a trial before the United States District Court for the Southern District of California, the Honorable Pierson Hall presiding, which adjudged the defendant guilty on each of Counts One, Three, Four, Five and Six of an Indictment returned by the Grand Jury for the Southern District of California. This Indictment was brought under the provisions of Section 174 of Title 21, United States Code on March 5, 1958.

The jurisdiction of the United States District Court was based upon Section 3231, Title 18, United States Code. This Court has jurisdiction to entertain the appeal and to review the proceedings leading to said judgment

by reason of Sections 1291 and 1294 of Title 28, United States Code.

On September 23, 1958, the defendant was sentenced to the custody of the Attorney General for a term of years. Appellant filed his notice of appeal on September 26, 1958.

II.
STATUTE INVOLVED.

This Indictment was brought only under Section 174 of Title 21, U. S. C. The first page of the Indictment contains the erroneous mention of Section 371 of Title 18, U. S. C., which is the general conspiracy statute. However, Section 174 of Title 21, U. S. C., is the controlling section under which Count One was filed. A discussion of the applicable statute as to Count One was had during the instruction conference [Rep. Tr. 511, 512] and the Court stated that, in effect, the substantive offenses and the conspiracy were all contained in Section 174.

It is to be noted that the sentence of 20 years imposed upon the conspiracy conviction on Count One runs concurrently with the 20-year sentence imposed upon Count Three, a substantive offense.

III.
STATEMENT OF THE CASE.

The indictment in six counts was filed on March 5, 1958. [Clk. Tr. 6.] The case was placed on the calendar of Judge William M. Byrne at Los Angeles on March 10, 1958, when appellant was arraigned. Attorney Paul Sweeney appeared with him and moved for reduction of bail. The cause was then continued to March 24, 1958, for plea. [Clk. Tr. 10; Rep. Tr. 60.]

On March 24, 1958, the case was called for plea and Attorney Arthur Sherman appeared as counsel. It was continued to April 7, 1958, for plea. [Clk. Tr. 13.] A motion by the defendant for reduction of bail was heard on April 3, 1958, Paul Sweeney appearing for appellant. [Clk. Tr. 14.] At that time the bond was reduced to $10,000. An appearance praecipe showing Harry E. Weiss as the attorney in the case, was filed on April 7, 1958. [Clk. Tr. 15; Rep. Tr. 60.]

On April 7, 1958, the cause was continued to April 21, 1958, for plea and for the hearing of motions. Harry Weiss appeared as counsel. On April 15, 1958, a motion for Bill of Particulars was filed by Arthur Sherman and an opposition thereto filed by the government on April 24, 1958.

On April 28, 1958, Paul Sweeney again appeared as counsel on the hearing of appellant's motion for a Bill of Particulars. At that time a plea of not guilty to all six counts of the indictment was entered and the cause set for trial June 17, 1958. [Clk. Tr. 33; Rep. Tr. 61.] On June 17, 1958, Paul Sweeney appeared and, in the defendant's presence, requested a continuance. The cause was then set for jury trial on August 12, 1958. [Clk. Tr. 34.]

On August 12, 1958, Paul Sweeney appeared again and secured another continuance of the trial date to September 16, 1958. [Rep. Tr. 63.] The defendant knew on August 12, 1958, that the case was set for trial for September 16, 1958. [Rep. Tr. 64.]

From June 17, 1958, up until September 16, 1958, Paul Sweeney was the attorney for the defendant. Harry Weiss had "stepped out" as the attorney as of June 17,

1958. From that time Mr. Weiss was no longer representing the defendant. These statements were made to Judge Hall by appellant and by Paul Sweeney when appellant made his motion for still another continuance of the trial date on September 16, 1958. [Rep. Tr. 62.]

It appears from the above that there were two continuances and the request on September 16 was for a third continuance and a fourth trial date. [Clk. Tr. 33, 34.]

On September 16, 1958, when the case was called for trial and the jury panel in the courtroom, the defendant made his motion for continuance with no advance warning. [Rep. Tr. 4, 63.] Among other claims which appellant made as a basis for his motion to continue the trial, Mr. Sweeney alleged that he was "just aware of the fact that we were going to trial Friday of last week." He then suggested that some kind of negotiations had been in progress involving a plea in the State court by appellant in lieu of trying the matter in the Federal court. He was "totally unprepared to go to trial in this matter, thinking that this might be worked out in the State court and so we did not prepare our defense."

In this connection, it is of interest to note that Judge Hall also had before him the statement of government counsel with respect to the alleged negotiations for the disposition of the case. The explanation of government counsel was not included in the extensive quotation set forth in appellant's opening brief. It is as follows:

> "Mrs. Bulgrin: I would like to state for the record—I don't want to belabor the problem—but at no time except in one instance has the government, at least as far as I know, indicated to Mr. Sweeney or his client that the case would not be prosecuted. In our view it was a serious matter.

However, there were a rash of different proposals for the disposition of the matter against Mr. Stein. We afforded Mr. Sweeney the courtesy of considering them, as we would anyone, and they were turned down completely and, as far as I know, Mr. Sweeney was under the impression last week and quite some time before that we would go to trial.

The Court: I do not think there is sufficient grounds for a continuance. We will proceed to trial." [Rep. Tr. 8.]

With respect to Sweeney's claim that he was totally unprepared to go to trial, it is also important to note that he had previously stated to Judge Hall, in connection with an alleged variance between the facts set forth in the trial memorandum and the facts set forth in the indictment:

"* * * and when we were before Judge Clarke we did prepare defenses toward those overt acts, * * *." [Rep. Tr. 6.]

The record shows that the case was before Judge Clarke on April 3, 1958, April 7, 1958, April 28, 1958, and June 17, 1958. [Clk. Tr. 14, 16, 33, 34.] The defenses which Sweeney stated that he had prepared toward the overt acts in count one of the indictment would necessarily have applied to substantive counts two through and including six. [Clk. Tr. 1-6.]

During further colloquy between court and appellant, the following facts were brought out:

"The Court: Have you told Mr. Sweeney all the facts in this case?

The Defendant: Yes, sir.

The Court: He has advised you of the law and as to your rights?

The Defendant: Yes." [Rep. Tr. 64.]

The above was also omitted from appellant's extensive quotation in his opening brief.

Of further interest is a statement made by Attorney Sweeney to the court as follows:

> "* * * I think Mr. Stein has been satisfied with my services thus far and is confident to have me continue * * *." [Rep. Tr. 67.]

Mr. Sweeney then stated that his own situation "just made me wonder" whether he should try the case. The court stated to him: "It is up to the defendant to make up his mind."

Although the application for a fourth trial date was not made until the very day of trial on September 16, 1958, and was made with no advance notice to the court, it is apparent from the proceedings that Mr. Sweeney and the appellant had discussed that trial date previously. [Rep. Tr. 64.] Mr. Sweeney also stated that his arrest on a *"bribery"* incident had occurred at least two weeks before September 16, 1958.

> "Mr. Sweeney: It occurred two weeks ago.
>
> The Court: It occurred long enough ago that some change in counsel should have been made by this time." [Rep. Tr. 8.]

As indicated above, an appearance praecipe was filed by Harry Weiss on April 7. However, although a substitution of attorney was not filed, it appears clearly from the record that Paul Sweeney was the only attorney for appellant from June 17 to September 16, 1958. The defendant admitted that this was true. [Rep. Tr. 62.] An attempt was made to drag Mr. Weiss into the proceedings, even though appellant admitted Weiss had stepped out before

June 17, 1958. We might say at this point that this was apparently done because Weiss was not present in court with the opportunity of responding and he had, according to Judge Hall, played "horse" with the court once before. [Rep. Tr. 67, 68.] However, when it was apparent that the court was calling appellant's bluff and indicated Mr. Weiss should come into the courtroom for a statement [Rep. Tr. 66, 67], appellant admitted once more that Mr. Sweeney was his lawyer. [Rep. Tr. 68.]

When the court stated, "It is up to the defendant to make up his mind" [Rep. Tr. 67], it was the second time Judge Hall had made that statement to appellant. Previously he had said, after listening to what might be best described as "double talk" as to who was representing appellant:

> "The Court: Mr. Sweeney is your lawyer?
>
> The Defendant: Yes.
>
> The Court: Very well. You can sit down there at the table and talk to Mr. Sweeney. I will declare a few moments recess, before you put any witness on the stand.
>
> Mrs. Bulgrin: Yes, your Honor.
>
> The Court: You make up your mind whether or not Mr. Sweeney is your lawyer.
>
> Mr. Sweeney: All right, sir." [Rep. Tr. 65, 66.]

After appellant advised the court that he wished Mr. Sweeney to be substituted in place of Harry Weiss, Sweeney stated, "I think by tomorrow we are going to have another counsel that I will associate in the matter." [Rep. Tr. 68.] However, the record shows that no other counsel was associated in the case and Mr. Sweeney under-

took to represent the defendant as the only attorney in the case during the trial.

The court denied the motion for the continuance and a jury was selected. Although the court did not expressly ask the jurors whether or not they had ever heard of Mr. Sweeney, there is no indication that any of the jurors had had anything to do with him. [Rep Tr. 18, 19.] Further, the court asked the jurors this question:

> "Suppose you were charged with a crime, or some one near and dear to you, such as this defendant is here today, would you be willing to risk your rights and liberties, or that of the one near and dear to you, at the hands of a jury of twelve men and women if each one of them felt toward you or them as you now feel toward this defendant? Would you be willing to do so?"

The reporter's notes indicate that the response to this question was "(Assent)." [Rep. Tr. 23.]

The government called as witnesses on its case in chief Quentin Victor Browning, Clarence Winfrey, Celeste Winfrey, William C. Gilkey, Lawrence Katz, William R. Farrington and James H. Mulgannon.

After the government rested Mr. Sweeney made a motion for a judgment of acquittal on all counts of the indictment and argued the matter to the court. [Rep. Tr. 348-354.] He succeeded in convincing the court that the motion should be granted as to Count Two. [Rep. Tr. 350.] The case then proceeded on the remaining counts, that is Counts One, Three, Four, Five and Six.

Appellant called as witnesses William C. Gilkey, James H. Mulgannon, Evelyn N. Stein, Lorein Merle Babbins

and appellant. In rebuttal, the government recalled James H. Mulgannon to the witness stand. The motion for judgment of acquittal was not renewed.

The testimony of the witnesses is set forth hereafter in pertinent part.

Quentin Victor Browning (also known as "Duke" Browning) testified as a witness on behalf of the government. His address was in San Francisco, California. He had known appellant since approximately 1948. They met at McNeil Island Penitentiary during that year. [Rep. Tr. 70, 132.]

Mr. Browning saw appellant in the early part of January, 1956 at a bar on West Pico in Los Angeles, California. [Rep. Tr. 71, 134.] Apparently there was some conversation about the subject of heroin on the first meeting. Browning then merely told appellant that he, Browning, had been approached by a fellow that wanted some. Appellant told Browning that if he had the money he could go east and get a kilo of heroin, which is approximately 35 ounces. The two of them made arrangements to meet and talk later about it. [Rep. Tr. 71, 72, 133, 135.]

A couple of other meetings occurred between appellant and Browning and he told appellant that he had five thousand dollars. Appellant proposed to borrow a couple of thousand dollars from a friend of his to add to the $5,000 for the purchase of the heroin. [Rep. Tr. 73, 138.]

One of the meetings between the two men took place when the appellant saw Browning in front of the Watkins Hotel and they talked in appellant's car. This was ap-

proximately the 7th of January 1956, and was the night before appellant was supposed to leave for New York. Browning went to his safe and got the $5,000 which he gave to appellant ($3,000 of which he had gotten from the other person who wanted some heroin and $2,000 of which was Browning's), after they had a conversation in which appellant told Browning that he, Stein, had borrowed $2,000 on ten per cent interest. Appellant further stated that he had borrowed the money from Jim "Bergdog" (probably spelled "Birddog)". [Rep. Tr. 75, 138.] The two men decided that the kilo of heroin would be in sort of a "pool" and they would distribute it as partners. Browning was going to contact the people that he knew in order to sell the heroin. [Rep. Tr. 77, 78.]

During this time Browning had not talked to any government agents nor was he under arrest. [Rep. Tr. 139.]

Appellant was gone immediately thereafter for about ten days and when he came back, having left with $7,000, he told Browning that he had picked up the heroin in New York. [Rep. Tr. 73, 139.] When Browning saw appellant then it was approximately January 17th. Stein was again out in front of the Watkins Hotel and Mr. "Bergdog" was with him. Stein stated he would have to pick up the package the next day. Appellant and Browning agreed upon a meeting for the next evening, approximately the 18th of January. (The Mr. "Bergdog" died before the time of the trial.) [Rep. Tr. 79.]

The next evening appellant rented a motel on West Pico and Browning went over. Appellant showed Browning the merchandise and they talked about what to do with it. Browning further testified that by "merchandise" he was

talking about the heroin which was in four quarter kilos and in glassine bags. At that time appellant had the entire kilo of heroin with him. Browning and appellant cut up one quarter of it, which was kind of a grey powdery substance. [Rep. Tr. 80.]

In cutting the "merchandise," Browning and appellant used milk sugar and something called "Six X" which was also a sugar. They added an equal quantity of milk sugar to the heroin. Before that particular occasion Browning had seen heroin and had purchased it. [Rep. Tr. 81, 82.]

During the time Browning and appellant were cutting the one quarter kilo of powder, appellant told Browning that it would test out close to ninety per cent pure heroin. [Rep. Tr. 84.] Appellant also told Browning that he wanted to cut it a little further because he didn't think that people were entitled to that grade of merchandise for the price they had agreed to sell it for. The two men placed the substance into one-ounce packages and put them in glassine bags. [Rep. Tr. 86.] When they were finished they had approximately twenty ounces from the quarter of a kilo which was cut up. At the time Browning and Stein were cutting the heroin, each personally used a little of the narcotic. [Rep. Tr. 279.]

During the time that Browning did not see Stein, Browning did contact Clarence Winfrey at the latter's home on 27th Street in Los Angeles about five or six different times. Browning and Winfrey discussed the subject of heroin during those visits and Browning told Winfrey that he knew of "something that he might be interested in, and in the near future, in a few days, I would know for certain." The next day after appellant

returned Browning contacted Winfrey, who stated he would be interested in taking something, but that he was short of money. That night Browning went back to the motel and he and appellant "pro and conned it." [Rep. Tr. 90.] In other words, they discussed the amount of money that Winfrey had and the price for which they could sell it to him. Appellant told Browning that it would be all right with him if it was all right with Browning, that is to let Winfrey have some of the merchandise. [Rep. Tr. 91.] Appellant and Browning agreed to let Winfrey have one ounce for $350. At that time Browning also told appellant that he had one fellow who wanted ten pieces of "stuff." (A "piece" meant one ounce and "stuff" or merchandise meant heroin.) Appellant and Browning further agreed to let the man who wanted ten "pieces" have it for $300 an ounce and that Winfrey could have three "pieces" of "stuff" if he would pay for one. He could then owe appellant and Browning for two. [Rep. Tr. 92-95.]

The next day, on about January 19, 1956, Browning saw Winfrey. In fact, he took him three "pieces" of "merchandise" for which Winfrey paid $350 in cash and owed appellant and Browning $700. Winfrey was to pay the money that was due when he disposed of the "merchandise." [Rep. Tr. 103.] Browning also saw the other man who wanted some narcotics and gave him ten "pieces." [Rep. Tr. 96-99, 181.]

After Winfrey received the three ounces of heroin from Browning, appellant met Browning and the two of them went over to Winfrey's house. This was shortly after Browning saw Fred at the motel and they divided the kilo

of heroin. [Rep. Tr. 181.] That was in the latter part of January. [Rep. Tr. 185.]

Browning went up to San Francisco but just before he came down he called appellant and told Stein that Clarence Winfrey was "out" and that Winfrey wanted to make another buy. Appellant asked Browning if he had gotten the money and Browning told appellant that the latter should just give it to him and Winfrey would pay them later. Browning then gave appellant Winfrey's telephone number. [Rep. Tr. 100-102.]

When Browning came down from San Francisco it was about two or three weeks later. He had talked to appellant in the meantime. [Rep. Tr. 96-99, 181.] It was a Friday night and he met appellant out in Glendale or in San Fernando where they proceeded to "straighten" their business up. Browning gave appellant some money and they discussed the quantity of heroin that they had previously cut. Browning had contacted another party and that person wanted some "merchandise" and he told appellant of this fact. At that time Stein had the "plant" which meant the balance of the heroin, so whenever Browning wanted any he would contact appellant. When Browning told appellant that he had one fellow who wanted five "pieces" appellant told him that he had the "stuff." [Rep. Tr. 104, 105.] On this occasion appellant went out, returned and gave Browning twelve "pieces." [Rep. Tr. 106, 108.]

About a month after the two men cut the first quarter kilo, they cut a second quarter of the kilo in the same motel on West Pico in Los Angeles. During the months of January, February, March and April Browning got

approximately 51 ounces of heroin from appellant. As the result of the sale of the 51 ounces alone, appellant and Browning shared approximately $10,000 to $12,000. This was after appellant paid off $3,000 that he owed on the heroin to the people back East. In the month of May, 1956, appellant and Browning split up their partnership on disposing of this particular kilo of heroin. Each took one-half of the remaining heroin (a quarter kilo each) which had not been disposed of. [Rep. Tr. 109-112.] Appellant wrapped up his quarter kilo and took it away. [Rep. Tr. 122.]

When appellant and Browning divided the balance of the kilo of heroin which was in San Francisco at Browning's house, there was a mistake in their computations of the money due to each one of approximately $1,000. The two of them had sat down together and "pushed pencils." Then appellant went to Oakland to get the heroin, later returning to Los Angeles. The next morning Browning discovered that Stein had made a $1,000 mistake in appellant's favor. [Rep. Tr. 114-118.] Browning immediately called Winfrey and asked him if he owed appellant any money. Winfrey advised him that he did and Browning asked him to hold it up until Browning got there. It was the balance of three "pieces" of "merchandise." [Rep. Tr. 119, 120.] Appellant and Browning thereafter settled the dispute. [Rep. Tr. 120.]

In the early part of September, 1956, Browning came down from San Francisco and purchased five "pieces" of "stuff" from appellant. Browning paid appellant $3,000 for this heroin. Browning took it back up to San Francisco and sold it. [Rep. Tr. 124.] Browning knew that

this transaction happened in the early part of September but couldn't remember the exact date. [Rep. Tr. 127.]

Browning was arrested in the latter part of September, 1956, or the early part of October on a federal narcotics charge. [Rep. Tr. 147, 151.] The federal agents asked Browning where he was getting his narcotics and Browning decided to "clean the slate." He told them that he was getting them from appellant. [Rep. Tr. 148, 156.] These events took place in San Francisco. California. [Rep. Tr. 150.] Stein told the narcotics agents "everything" which had happened in 1956 but did not mention Winfrey's name then because he didn't know that anyone was interested in Winfrey. As a matter of fact, the first time anyone asked about Clarence Winfrey was in the grand jury proceeding in connection with appellant's prosecution in March, 1958. He was then asked about Winfrey and he told the grand jury all about him. [Rep. Tr. 150, 156, 159-162.] After he told the officers "everything" he also advised them that he would come down to Los Angeles and endeavor to make a buy from Fred Stein. Shortly after his conversation with the agents, probably in November, Browning called appellant long distance from San Francisco and made an appointment with him. This was at the number of a phone in a booth. [Rep. Tr. 125.] Browning left on Saturday night and got here on Sunday, approximately the 29th of November. [Rep. Tr. 126, 145.] Several telephone calls were exchanged between Browning and appellant after Browning arrived in Los Angeles. The two men met on Jefferson between Tenth and Eleventh Avenues. [Rep. Tr. 127.] Before Browning went to meet appellant, Mr. Mulganin, an agent of the Federal

Bureau of Narcotics at San Francisco gave Browning $1800 in cash.

After Browning and appellant met they took a ride and Browning told Stein that he, Browning, had $1800 and wanted to make a buy of heroin. Appellant told him that he would sell but didn't want to for less than $500 an ounce. Stein then said he would take the $1800. Browning then owed him $300 as a result of the occasion when he bought the five "pieces" from Stein. Browning had been $300 short since he had only $2700.

Appellant took Browning's $1800 and told Browning that he would see what he could do. Appellant dropped Browning off and called him later on the telephone. At that time he said the "man" wasn't there, that he couldn't contact him and it would be held up until the next day, a Monday. [Rep. Tr. 128, 129.]

Several telephone calls were exchanged back and forth, and appellant asked if Browning, wanted to pick it up in Bakersfield. Browning agreed to do so. Finally, on Monday evening Stein called Browning and told him that "it wasn't any go." On that evening appellant met Browning and told the latter that he couldn't do any business, "that the man was out and he had sold the last eight pieces of stuff in Bakersfield, and he was trying to stop some of it in Bakersfield so that I could have some, and which he was unable to do." At that point appellant gave Browning his "roll" of money. Browning did not count it at that time. Later, Browning returned the money to Mulganin, suggesting that it be counted. When it was counted there was only $1500. Browning called Stein back and asked him why he took the $300 out of "some-

body else's money." (Browning had told Stein that the purchase was for a Mexican boy that he had known in San Francisco.) Appellant told Browning that it wasn't "any of his affair," and refused to return the $300. Browning had to make the $300 good himself when he got back to San Francisco. Browning did not remember seeing Stein after that time. [Rep. Tr. 130-132.]

Clarence Winfrey testified on behalf of the Government in part as follows: He lived in Los Angeles, California, and he had first met "Duke" Browning in the year 1947. In January of 1956 Browning came to his house several times, once with Barney Stein, Fred Stein's brother, and his wife. The next evening Browning came by again and told Winfrey that he had something in which Winfrey might be interested. [Rep. Tr. 189, 190.] Browning and Winfrey at that time talked about narcotics. Winfrey told Browning that he would be interested if, in effect, the price and other circumstances were right. Browning asked Winfrey how many ounces he could use and Winfrey said he didn't know right then. Browning agreed to let him know in a few days. [Rep. Tr. 192.]

A few days later Browning came to Winfrey's home again and said that the person he was waiting for was back in town. He asked Winfrey how much the latter could use. Winfrey told him that all he had was about $350. Browning said it would cost him $350 for each ounce and that Winfrey could have three, two on consignment and one for cash. Winfrey agreed to take the deal. The next night Browning contacted Winfrey again and had the "merchandise" with him. Browning said he brought the "package," which Winfrey testified was three ounces of

heroin. Winfrey paid Browning $350. Winfrey thereafter put about ten or twelve spoons of milk sugar in each ounce which he received from Browning. In other words, he cut it not quite fifty per cent. Thereafter Winfrey resold the heroin for $200 per ounce. No one ever complained to Winfrey that it was not good "stuff." As a rule, he testified, no one ever used the word heroin, it is either a "package" or "merchandise" or "stuff." [Rep. Tr. 194-199.]

Winfrey saw Browning a day or two later on a social call. The next time Winfrey saw Browning the latter told Winfrey that he was going out of town, north. Within a day or two Mr. Browning had returned to Los Angeles and brought Fred Stein over to Winfrey's house. Winfrey recognized Stein from having seen him at McNeil Island. This meeting was in February or the latter part of January. [Rep. Tr. 200, 201.]

About ten days or two weeks after Browning left town appellant called Winfrey on the telephone. Appellant asked Winfrey if he needed any more "merchandise" and Winfrey told him "yes." Shortly thereafter, at Bronson and Washington, Winfrey gave the $700, which he owed Browning for the two ounces of heroin he had received on consignment, to either Fred Stein or Barney Stein. At that time they were in a 1947 Dodge together, and he believed that he gave it to Fred Stein. This was about two weeks after he had gotten the "merchandise" from Mr. Browning. [Rep. Tr. 203-205.] Just previous to meeting Fred Stein at Bronson and Washington, appellant had called Winfrey on the telephone. Winfrey told appellant that he had something for "Duke" and Stein told

Winfrey that he, Stein, would pick it up. It was then that they made arrangements to meet at Bronson and Washington. Also, just previous to appellant's phone call, Winfrey had had a telephone conversation with "Duke" Browning about the $700, and Browning asked Winfrey if he, Winfrey, was "ready" to get any more "merchandise" at that time. Winfrey told him "yes." Winfrey advised Browning that he had the money, and the latter stated that he would have somebody contact Winfrey for it. It was right after that that Winfrey gave the money to Fred Stein. [Rep. Tr. 206, 207.]

About the next evening after the $700 was paid, appellant telephoned Winfrey and arrangements were made for the two to meet in a half an hour at the corner of Bronson and Washington, where they had previously met. They talked at that location about Duke Browning and Winfrey told appellant that he, Winfrey, had a proposition with Duke Browning. Appellant then said that he had talked with "Duke" Browning about Winfrey. Winfrey told appellant that he was ready for more merchandise, being out at that time. Appellant said he would contact Winfrey later. [Rep. Tr. 207-209.]

Later that evening Winfrey got another telephone call from Stein, who told Winfrey to meet him at the same place. Winfrey went out, saw him there and got three ounces of "merchandise" packaged in a cellophane bag.

Winfrey did not give appellant any money then, but did take care of the purchase price later when Browning and appellant had a "hassle" about some money. At that time Browning told Winfrey to hold the money until he could come to town to straighten it out with appellant.

[Rep. Tr. 210, 211.] Winfrey received the above three ounces from appellant in February of 1956. [Rep. Tr. 214.]

After that purchase, Winfrey bought more of the "merchandise" from Stein on approximately ten or twelve occasions. In each such transaction, Winfrey bought approximately three ounces. Each time it was taken by him on consignment, and he eventually paid for the merchandise at $350 per ounce. After he got it from Stein, he would cut it with milk-sugar and resell it for $200 an ounce. Several times Winfrey met appellant on Beverly Boulevard to obtain the "merchandise." Stein would hand the substance to Winfrey's wife who was sitting in the car on each of the occasions. The packages were all in cellophane bags, and the substance was an off-white powder. [Rep. Tr. 215-218, 238.] The largest quantity that Winfrey ever remembered buying from appellant was about six ounces. [Rep. Tr. 220.]

Clarence Winfrey bought more "merchandise" from appellant on three or four occasions in 1957 during January and February. On approximately March 3, 1957 he bought three ounces from him. This purchase was also made on the street and Winfrey's wife was with him again. [Rep. Tr. 220, 221.] At that time Winfrey gave him approximately $700 but owed him the balance of the money.

Winfrey stated that on the occasions during 1956 and 1957 when Winfrey bought "merchandise" from appellant, Stein always contacted Winfrey by telephone to make the arrangements for delivery. [Rep. Tr. 221, 222.]

On March 12, 1957, Winfrey's wife, Celeste, was arrested on a narcotics charge. Immediately thereafter Narcotics Agents talked to Clarence Winfrey. Winfrey then called appellant on the phone several times in an effort to buy some narcotics from him. The price involved was approximately $3000. [Rep. Tr. 223, 224.] Winfrey got about $2100 from a narcotics agent, according to his recollection, and he had approximately $1100 of his own money that he put in as a temporary loan to the Government agents. In one of the telephone calls, Winfrey told Stein he would like to talk to him and they made arrangements to meet. They did so across from the Pan Pacific Auditorium on Beverly Boulevard near where they had met before and had a conversation. Winfrey asked appellant about some narcotics, Stein told Winfrey he would let him know, but he couldn't give an answer at that time. Appellant asked Winfrey why the latter had not told Stein Celeste Winfrey had been arersted. Winfrey told appellant that he thought he knew about it, that quite a few people knew about it. From that time on it was just a matter of Stein telling Winfrey to wait, that Stein would let Winfrey know and they would ride around. [Rep. Tr. 224-226.]

Winfrey saw appellant during the first of June in 1957 and this was close to the last time he saw him. At that time Winfrey had a conversation with Stein. They talked about different sentences that people had been getting they had read about in the paper. One they discussed got 80 years and another got something like 30 or 50 years. [Rep. Tr. 227, 228.] At this time appellant was still telling Winfrey to wait about the narcotics, that he would let Winfrey know.

During the first part of July Winfrey had another discussion with appellant about narcotics and Winfrey told Stein that he was still interested in some. Appellant stated to Winfrey that nothing had happened yet but he would let him know if anything did. About that time they also had a discussion about a property loan that Winfrey was getting. Winfrey advised appellant that he was getting cash from the loan. [Rep. Tr. 229, 231.] Winfrey also stated that he was pretty well pushed and would like to get some narcotics because he was in pretty bad shape. Stein still said that he would let Winfrey know.

Stein never let Winfrey know. [Rep. Tr. 232.]

After Celeste Winfrey had been arrested, the Federal narcotics agents did not talk to Winfrey about a buy from Stein in the sense that he would help his wife out by trying to make a purchase from appellant. Winfrey did not go to the government agents and tell them that anything he could do to help his wife out of her difficulty would be done by him. The federal agents merely asked him where he was getting his narcotics from and he told them it was Fred Stein. [Rep. Tr. 242, 243.]

Winfrey testified that before he took the stand in the case government counsel had told him there would be no promises with respect to his wife and his testimony. Further, he was told that government counsel did not know the outcome of Celeste Winfrey's problem and there would be no commitment as to what might happen in that matter. He still agreed to testify after being so advised. [Rep. Tr. 251, 252.]

Celeste Winfrey testified in part as follows: she was Clarence Winfrey's wife and first saw appellant Fred Stein during the first part of 1956 when Mr. Browning brought him to the house. [Rep. Tr. 258, 259.] She saw him again on a street corner when she was in a car with her husband. Appellant handed her a package which was a little cellophane bag in a paper bag. In the cellophane bag was a whitish powder which the Winfreys took home with them. Thereafter during the year 1956 she saw Fred Stein on an average of once a month. Sometimes appellant made social calls to the house and other times they met him on the street corner. On the latter occasions Clarence Winfrey would give him money and Fred Stein would give them a package. Usually the amount that was given to appellant was from $500 to $1000. [Rep. Tr. 262.] All of the packages were similar. She saw Fred Stein on the street corner approximately 8 or 9 times on the same type of transaction. [Rep. Tr. 260, 261.]

On March 12, 1957, she was arrested. Prior to her arrest, the last time a transaction occurred on a street corner was about a week before. At that time appellant gave the Winfreys another package. Clarence Winfrey gave Stein a roll of bills. [Rep. Tr. 262.]

Mrs. Winfrey identified a man who was in court as "Stymie" Beard. During March of 1957 she had a transaction with Beard on one occasion when she gave him a half ounce. She got $100 from him in cash. The one half ounce was from the "merchandise" that the Winfreys had gotten from appellant. Before the Winfreys had sold it they cut it. [Rep. Tr. 263-265.] The substance

in government's Exhibit 2-B resembled the powder which the Winfreys had previously gotten from Stein. [Rep. Tr. 265-267.] She testified further that heroin is an off-white color and that the Winfrey cut their merchandise with mik-sugar so that it was a lighter substance in color. the color of the heroin slightly. [Rep. Tr. 277.] After the sale to Beard, Celeste Winfrey was arrested for the sale of narcotics, as she had some marked money on her. [Rep. Tr. 268.]

After Celeste Winfrey left the stand, Clarence Winfrey was again called to testify. He was shown Exhibit 2-B. He testified that it resembled the substance which he had received from appellant except that it had been cut with milk-sugar so that it was a lighter substance in color. [Rep. Tr. 276, 277.]

Quentin Victor Browning was also recalled to the stand and examined Exhibit 2-B. He testified that it was similar to the substance which he had secured from Stein from time to time as he had previously testified. He qualified his answer by stating that 2-B had been "cut" quite a bit and that it was much lighter in color. [Rep. Tr. 278.] He also said that the material which he had secured from appellant resembled the material that he had used when he "took a bit once in a while." As a matter of fact Fred Stein and Browning had "done a little together" while they were cutting up the material previously. [Rep. Tr. 279.]

William C. Gilkey was called to the witness stand by the government and testified that he had been a federal narcotic agent since 1956. [Rep. Tr. 282.] He had first seen Clarence Winfrey during the early part of 1957, perhaps in January or February. Later in July of 1957

he saw Clarence Winfrey with appellant. In fact he saw them twice together in July. The first time was on July 9th near the intersection of Beverly Boulevard and Sierra Bonita Avenue. On that occasion Gilkey saw appellant drive to that area and Winfrey leave his own automobile and enter the car which Stein was operating. The two of them drove to a drive-in and remained there for about 20 minutes, then returning to the place where they met. Winfrey left the automobile, entered his own and joined the officers at a pre-arranged spot. [Rep. Tr. 283, 284.] Two lays later Gilkey saw the two men together again at the same intersection of Beverly Boulevard and Sierra Bonita. Winfrey again drove to the area in his automobile, Gilkey following. Forty-five minutes later appellant arrived in another car and entered Winfrey's vehicle. At that time appellant lived only about three blocks from that spot. This was on the 11th day of July and the two men had a conversation. Gilkey related certain conversation that he had heard between appellant and Winfrey over a listening device, but Paul Sweeney was successful in causing the court to strike any conversation which was heard on the listening device. [Rep. Tr. 285, 288, 326.]

Gilkey testified that he was familiar with the language of those who were engaged in the illegal sale of narcotics and that his understanding of the word "stuff" was that it referred to heroin, cocaine or any narcotic drug. A "piece" was an ounce.

Gilkey further testified that on about March 14 Winfrey was furnished $2100 by the government prior to his meeting with Mr. Stein, and that Winfrey also had about $1000 of his own money. [Rep. Tr. 294.]

Gilkey was later recalled by the government and was shown Exhibit 2-A and 2-B. He stated that on March 12, 1957, he had purchased the exhibits from Matthew Beard for the sum of $100 of official advance funds. He had purchased it from Beard approximately a block distance from Celeste Winfrey's residence. It was thereafter sent to the chemist in San Francisco, California. [Rep. Tr. 328, 329.]

The agent had seen Matthew Beard go in the direction of Celeste Winfrey's house just after Gilkey had given Beard $100 of official advance funds and noted the serial numbers. He saw that money again shortly after Celeste was arrested on March 12, 1957, which was the same date Beard had gone into the Winfrey residence. The numbers of the bills were the same as compared to the original list of numbers. [Rep. Tr. 330-338.]

Among other things, it was stipulated, in effect, between the appellant and the Government that with respect to exhibit 2-B that a chemist employed by the United States Treasury Department in San Francisco who received that exhibit by mail at his office on March 14, 1958 submitted the contents of 2-B to a chemical test and that he would testify it was 210 grains of heroin. [Rep. Tr. 334, 335.]

William Farrington testified that he was a Deputy Sheriff for the county of Los Angeles, assigned to the Narcotic Detail. On March 12, 1957, he saw money given to Matthew Beard, the serial numbers of which had been recorded in his presence. Later that afternoon in the home of Celeste and Clarence Winfrey, he saw money found in the possession of Celeste Winfrey. The serial

numbers of those bills were identical to the serial numbers of the bills which had been previously given to Matthew Beard on the same day. [Rep. Tr. 341-343.]

After Agent Farrington concluded his testimony, the Government rested. Mr. Sweeney then made a motion for a judgment of acquittal of all of the counts of the indictment. [Rep. Tr. 348.] Argument was had at the Bench and the Court granted the motion as to Count Two. [Rep. Tr. 350.] The Motion was denied as to all of the other counts. [Rep. Tr. 350-354.]

After making an opening statement [Rep. Tr. 355, 356], appellant called Agent William C. Gilkey to the witness stand. [Rep. Tr. 356, 358.] The next witness for appellant was Agent Mulgannon. [Rep. Tr. 359.] Mr. Mulgannon testified to certain matters concerning a case involving Duke Browning in San Francisco. [Rep. Tr. 359-362.]

At the Bench, a discussion was had between court and counsel with respect to certain documents that Mr. Sweeney indicated he wanted in evidence. He mentioned that one was a photostat of a hotel registration and that there was some pertinent correspondence also. He indicated that he was hoping for a stipulation from Government counsel for the appellant to avoid subpoening a witness from New York. [Rep. Tr. 363-365.]

Evelyn Stein was called as a witness for appellant and she testified that on September 5, 1956, she left for New York City with Fred Stein and her daughter Lorien Babbins. [Rep. Tr. 385.] They arrived in Newark, New Jersey on the 6th and Fred Stein went on to New York

by plane. The witness went to Buffalo with her daughter because of her father's illness. [Rep. Tr. 366-371.]

On about September 12, the witness and her daughter traveled to New York and joined Fred Stein at the Seymour Hotel. They left on the 19th of September and returned to Los Angeles, arriving here the 20th. [Rep. Tr. 372, 373.]

Evelyn Stein also testified that on the 3rd day of March 1957, she and appellant left Los Angeles and traveled to Ensenada, Mexico to get married. [Rep. Tr. 374, 375.] However, they were married on March 6, 1957. [Rep. Tr. 377.] She received a marriage receipt dated March 6, 1957 and also a marriage certificate which was dated March 8, 1957. [Rep. Tr. 378, 379.]

The next witness for appellant was Lorien Merle Babbins, daughter of Evelyn Stein. [Rep. Tr. 401.] She testified with respect to the alleged trip to New York on September 5, 1956 with her mother and Fred Stein. [Rep. Tr. 402-405.] She also testified that her mother and Mr. Stein took a trip on March 3, 1957 and that they returned to Los Angeles about the 7th or 8th of that month. [Rep. Tr. 406.]

The last witness for the defense was appellant. Stein testified that he resided in Los Angeles [Rep. Tr. 409] and that during 1956 and 1957 he was a used car salesman, in business for himself some of the time and on other occasions selling cars on consignment. He first met Mr. Quentin Browning at McNeil Island in 1948. [Rep. Tr. 410.] He stated that the next time he saw Browning was in the latter part of 1955 when the latter came to Los Angeles. Previously Browning had sent Stein a

letter in which Browning had asked Stein to collect some money for him which was due for a sale of narcotics. Browning also told Stein in the letter that he, Browning had a "pretty fair connection" and if Stein would contact him that Browning would make arrangements to come to Los Angeles and discuss the connection.

When Browning came down in December of 1955, he contacted Stein by going to a bar where he had sent the above letter. Appellant did not own the bar but it was about 10 minutes from his home. [Rep. Tr. 411-413.]

A couple of days later Stein went to the bar and Browning was waiting for him there. They had a conversation at that time. [Rep. Tr. 414.] When asked if there was any discussion of narcotics during the first conversation at the bar, Stein said "not the first time." [Rep. Tr. 415.]

Stein claimed that he saw Browning after this first meeting at the Watson Hotel on West Adams Boulevard in Los Angeles. Stein had given Browning his phone number and Browning called Stein. Stein had also given Browning his brother's phone number in case he couldn't get in touch with Stein at his own number. This second meeting occurred about four or five days after Stein met Browning in the bar and was still during the first part of January 1956. [Rep. Tr. 415.]

Stein claimed that on the occasion at the Watkins Hotel he had a conversation with Browning about some "good horse information." Browning then supposedly asked Stein for $300 because he had his money tied up in a Western Union Money Order which he didn't have time to pick up. Stein gave Browning $300 and Browning went to the track. [Rep. Tr. 416, 417.] Stein said he did not

see Quentin Browning from the time he saw him in January of 1956, when he allegedly gave Browning the $300, until the 2nd of December 1956. [Rep. Tr. 429.]

Stein recalled meeting Mr. Winfrey in the company of Browning sometime during the first part of January. Stein met him at the bar and Browning explained that Winfrey was from McNeil. The two of them got into a car and drove over to Winfrey's home and saw the latter there. [Rep. Tr. 418.] Stein testified that there was no discussion of narcotics during the conversation which was had at Winfrey's home at that time. [Rep. Tr. 419.]

Stein testified that he went to the Winfrey home once or twice thereafter but never met him on the street. [Rep. Tr. 419.] Appellant claimed that the only telephone conversation he had with Winfrey during the year 1956 was toward the end of the year, that Winfrey called him two or three times. [Rep. Tr. 420.] During one of those conversations Winfrey asked Stein to drop by his house. Stein did and Winfrey told him that he hadn't seen Duke in sometime and "he needed something and where could he lay his hands on some things." Stein knew that he had reference to heroin. [Rep. Tr. 421.] On each of the occasions in which Winfrey called Stein, they would make arrangements to meet. At the time of seeing one another they would have the same general type of conversation. At one time they met on Sierra Bonita. [Rep. Tr. 421, 422.]

On one occasion Stein met Winfrey at Sierra Bonita and Beverly, across the street from the Pan Pacific. [Rep. Tr. 423, 424.] Winfrey and Stein took a ride and stopped

at a drive-in, where they talked. Winfrey kept telling Stein "how hard things were for him." [Rep. Tr. 425.]

A few days later Winfrey and Stein had another conversation in a '57 Chevrolet while the two of them were riding in it. [Rep. Tr. 426.] On that occasion Winfrey again started telling appellant "how bad things were with him." Stein told Winfrey that "they were bad for me too." Winfrey asked Stein if he could possibly tell Winfrey where to go so that he "might help himself." [Rep. Tr. 427.] Winfrey also told Stein that he was going to borrow some money on his home and asked appellant to try to find a "connection" for Winfrey. [Rep. Tr. 428.] At that time Winfrey told Stein that he wanted to get a supply of heroin to sell. The loan which he was going to get on his home would have netted Winfrey $1000 and Winfrey wanted to buy the narcotics with that money. This was near July 11th. [Rep. Tr. 467.]

Winfrey had also asked Stein for some heroin during the first part of 1956. [Rep. Tr. 459, 463.] When Clarence Winfrey spoke to Stein on at least one such occasion during that time and asked him for "something," Winfrey was talking about narcotics, specifically heroin. [Rep. Tr. 463.] Winfrey told Stein that Duke Browning was in Seattle and he couldn't get in touch with Duke. The reason that Winfrey asked Stein for some heroin was because of Duke's absence. Winfrey had been getting it from Browning and Stein knew this. [Rep. Tr. 459.]

Stein further testified that all during 1956 Browning used to come to Los Angeles for the races and then return to San Francisco. Browning was used to sending money to Fred Stein's brother to bet on the horses for him.

Browning used to play $300 on a horse, "win, lose or draw." [Rep. Tr. 417, 460.] Browning would always send the money down by Western Union. [Rep. Tr. 461.] At least on one occasion Duke Browning won $1,100 on a horse. [Rep. Tr. 462.]

Stein admitted that $700 was paid by Clarence Winfrey in late January or early February 1956, but claimed that it was to bet on two horses. [Rep. Tr. 466.]

Fred Stein testified that he saw Quentin Browning on the 2nd of December 1956 on Jefferson near 11th Avenue. This was about six o'clock in the evening. [Rep. Tr. 429.] Browning got into Stein's car and they had a conversation in which Stein told Browning that he knew of a race in Florida that was to be fixed. Browning asked Stein if the latter could bet some money for him and Stein agreed. [Rep. Tr. 430.] At that time Stein was parked on the street at the above location and Browning had come up in his own car which he parked there. [Rep. Tr. 471.]

When appellant agreed to bet some money for Browning, the latter told appellant that he had about $1800 and appellant took it from Browning. Appellant called Browning later and told him that he, appellant, couldn't get it "down" but that he might be able to do it the next day. However, the next day Stein counted off $300 which Browning owed him and then called Browning at Browning's sister's house. [Rep. Tr. 430.]

The whole transaction had been a ruse, Stein claimed, to get Browning to come to him and pay the $300 back to Stein. Although Fred Stein's brother was "making book" during 1956 [Rep. Tr. 432], and Browning had been betting at least $300 per transaction with the brother,

on one occasion winning at least $1,100, Stein used this method of recovering the alleged year old debt from Browning. [Rep. Tr. 431, 432.]

On the 3rd of December 1956 Stein called Browning and asked the latter to meet him at the same place of the previous day's meeting.

All that happened on the occasion of the 3rd was that Browning met Stein at Jefferson and 11th Ave. and Stein pulled up along side the sidewalk where Browning was standing. Stein then reached over to the right-hand window of the car and told Duke he couldn't make the bet and then gave the $1500 to Duke. Browning reached in the car got the money and put it in his pocket, without counting it. In other words Browning was standing outside of Stein's car and reached in through the window. After Browning put the money in his pocket Stein drove off. Appellant didn't let Browning get in the car because he didn't want any trouble with him. Appellant figures Browning might start counting the money, note the $300 shortage and then create some difficulty about it. Appellant did not want this to happen. Browning later called Stein and they had a discussion about the money that Stein had deducted from the $1800. [Rep. Tr. 431, 470, 474, 475.]

Stein testified as that on September 5, 1956 he started on a trip to New York City with Evelyn Babbins and her daughter, arriving on September 6th. Paul Sweeney attempted to get in evidence a photostatic copy of a letter allegedly from the manager of the hotel Seymour in New York City. The Court stated that the letter would not be admissible [Rep. Tr. 435], and denied a motion for a

continuance for the purpose of subpoening that witness. [Rep. Tr. 436.] This was outside of the presence of the jury. [Rep. Tr. 435.] However, Sweeney was successful in having a registration slip for that hotel admitted in evidence which Stein testified he signed when he was back in New York. [Rep. Tr. 438, 439.] Stein also testified he took a trip beginning the 2nd day of March 1957 with Evelyn Babbins to Ensenada for the purpose of getting married. He claimed that he arrived in Ensenada on the 3rd of March 1957 [Rep. Tr. 440], but that he and Evelyn Babbins were not married until the 6th of March in Tijuana. [Rep. Tr. 441.]

On direct examination Stein had testified that in 1956 and 1957 he was a used car salesman, at times in business for himself and occasionally selling cars on consignment, as indicated above. [Rep. Tr. 410.] On cross-examination further testimony was given with respect to that particular occupation. He then testified that his total income during the time he was in that business for the year 1956, when he had no other occupation, was about $1800, to $2000. The total "gross" he later testified was about $2000 or $2500. [Rep. Tr. 451, 476, 477.]

Stein also testified that he paid a share of the expenses on the trip to New York and it cost him about $650. This was in addition to the $300 that he had loaned Quentin Browning that same year of 1956, so that he had expended for those items alone $950 out of his total income of about $2000. When he added the hotel bill for the New York stay, the total expenditures came to about $1,100. [Rep. Tr. 477, 478.]

Appellant was convicted in 1946 for receiving, concealing and facilitating the transportation and concealment after importation of smoking opium. [Rep. Tr. 451, 452.] Stein had also been convicted in February, 1935 for the unlawful selling and dispensing of morphine in violation of 26 U. S. C. Section 692. [Rep. Tr. 480.] On June 30, 1938 appellant was again convicted of a charge of possession of opium and in the same year had a felony conviction for counterfeiting. [Rep. Tr. 481, 482.] On cross-examination Stein volunteered that he had known a person named as Jim Birddog during the "bootlegging" days. [Rep. Tr. 456.] It was after that the Court asked appellant "You say you knew him in the bootleg days?" Stein answered affirmatively and the Court asked what their relationship was. Stein then said he would buy alcohol from that person and Birddog would buy whiskey from him. [Rep. Tr. 458.]

On rebuttal, the Government called Agent James H. Mulgannon of the United States Bureau of Narcotics in San Francisco and he testified that he had seen Fred Stein and Browning together on December 2, 1956, at Jefferson and 11th in Los Angeles, California. This was just after Mulgannon gave Browning the $1500 of official advance funds. Mr. Chappel gave an additional $300 to Browning. [Rep. Tr. 490, 491, 492.]

Mulgannon testified that after Browning got into Stein's car on the 2nd, they cruised around in an area that covered about ten or twelve blocks. Mr. Stein was driving the automobile during this entire time. The car was driven very slowly, entered some dark streets and just cruised back and forth aimlessly for about 15 to 20

minutes. Browning returned under surveillance without the money. [Rep. Tr. 495-497.]

The next day on December 3, 1956, at about 8 o'clock in the evening, Browning was searched again at Agent Richards' home and no funds were on his person. He met Stein on the corner of Jefferson and 11th. Browning left his own automobile and entered appellant's automobile. [Rep. Tr. 498, 499.] Although appellant had testified that Browning did not get into his automobile on the occasion of the third, and that there was merely an exchange of money, after which Stein drove off, Mulgannon testified that Stein started his automobile after Browning entered and they drove around from approximately 7:15 to 8:10 P. M. [Rep. Tr. 498, 500.] The automobile did not stop anywhere and Stein drove very slowly about 10 to 15 miles an hour up dark streets, making left and right hand turns in the darkened area. Stein went back and forth retracing his movements through the vicinity. [Rep. Tr. 500, 501.] When Browning came back on the 3rd from this occasion there was $1500 on his person. [Rep. Tr. 506.] After the Government concluded rebuttal the motion for judgment of acquittal was not renewed. [Rep. Tr. 507, 508.]

Counsel for both appellant and government had an extensive conference with the court with respect to instructions. [Rep. Tr. 509-524.]

Thereafter argument was made to the jury by both the government and appellant. [Rep. Tr. 525-601.] Each of the parties finally stated that there were no exceptions to the proposed instructions. The Court then instructed the jury [Rep. Tr. 604-634], and the jury retired at 12:30

P.M., on Monday September 22, 1958. At 3:30 P.M. the jury returned with a verdict of guilty as charged in Counts One, Three, Four, Five and Six.

After the jury was excused Paul Sweeney advised the court that there would be a motion for new trial or a "motion for verdict notwithstanding the verdict of the jury." The Court stated that he would be gone beginning "the day after tomorrow" and would "not return until November." There does not appear to be any statement as to whether or not the court was on vacation or would be absent on official business. Mr. Sweeney then said: "I guess I will have to argue tomorrow. What time would your Honor set?" [Rep. Tr. 639.]

On September 23, 1958, the case came on for sentence and further proceedings. Mr. Sweeney presented a motion for new trial on certain grounds set forth in the transcript. [Rep. Tr. 642, 645.]

Among other grounds presented was the fact that the defendant was not granted a continuance in order to secure additional counsel. [Rep. Tr. 645.] The Court stated with respect to that ground:

> "In connection with your comment on the last reason, that the defendant was substantially prejudiced and deprived of a fair trial by reason of the following circumstances, that the defendant was not granted a reasonable continuance in order for him to secure additional counsel, I have been a member of the bar since 1916, I have been on this bench since 1942, and I know of nothing that any other or additional counsel could have done that you, Mr. Sweeney, did not do in the protection of this defendant's rights.

> "The case was tried skillfully and adroitly on behalf of the defendant by you, and I cannot see how his rights would have been prejudiced by securing any additional counsel."

The motion for new trial was denied. [Rep. Tr. 646.]

Afer the motion for new trial was argued, the Court sentenced the defendant to a total of 50 years, stating:

> "The Court, in view of this defendant's past history and the fact that he has been engaged practically all of his life in a life of crime, feels justified in completely isolating him from society." [Rep. Tr. 651.]

Appellant filed his notice of appeal on September 26, 1958. [Clk. Tr. p. 74.]

IV.

ARGUMENT.

(1) There Was No Abuse of Discretion in the Denial of Motion for Continuance.

It is clear that the granting or refusal of a continuance "is within the sound discretion of the Court and not subject to review in the absence of a clear showing of abuse."

> *Davenport v. United States,* 197 F. 2d 157 (5 Cir., 1952).

It is submitted that a review of the entire record of the proceedings before the trial court shows that there was no abuse of discretion. This is particularly true since the record reasonably leads one to the inference that appellant was merely engaging in dilatory tactics to obtain a fourth trial setting on September 16, 1958, in a case which had been first called for trial as early as June 17, 1958.

Attorney Paul Sweeney appeared with appellant on September 16, 1958 when the case was called for trial for the third time. The jury panel was in the courtroom, ready for selection. Appellant made his motion for continuance with no advance warning. There was no written motion or affidavits filed in support of the various claims made by appellant and his attorney, even though the situation mentioned as one of the grounds for continuance had occurred at least two weeks prior to September 16, 1958 and appellant had discussed the matter with Mr. Sweeney in the interim.

Appellant's opening brief is replete with statements which are not supported by the record. On page 6 appellant claims that Paul Sweeney moved for the continuance upon the ground that he was at the time charged with a violation of the State narcotics law and with offering a bribe to state and county officials, citing California code sections. The record shows that Mr. Sweeney advised Judge Hall only that there was a question of recent publicity on his arrest on a "bribery" incident. [Rep. Tr. 7.] The record is devoid of any mention that his case involved narcotics charges. The two "samples" of the newspaper clippings mentioning a narcotics case against "Paul Wesley Sweeney" which counsel for appellant has felt "justified" in attaching to his brief were not brought to the attention of the trial judge. Thus the Court had no opportunity to consider that factor in ruling on the motion. Also, at page 6, counsel states that Mr. Sweeney was appearing for the appellant at the opening of the trial "for the sole purpose of getting a continuance." The record lacks any mention by Mr. Sweeney or by the appellant during the

proceedings below that Mr. Sweeney was appearing for the "sole" purpose of making the motion.

Appellant came to Court on September 16, 1958 with the attorney of his choice and was actually prepared to go to trial if the motion were denied. Although an appearance praecipe was filed on April 7, 1958, showing Harry E. Weiss as the attorney in the case, Mr. Weiss had "stepped out" as the attorney as of June 17, 1958, according to appellant's own admission. [Rep. Tr. 62.] Even before that time, Paul Sweeney had appeared as counsel for the defendant on two occasions, once on April 3, 1958 when he succeeded in getting the bond reduced to $10,000 and again on April 28, 1958, when he appeared on a hearing for the defendant's motion for a bill of particulars. At that time, the not guilty pleas to all six counts of the indictment were entered and the cause set for trial June 17, 1958. On the latter date appellant appeared with Mr. Sweeney and requested a continuance. It was then set for jury trial on August 12, 1958. [Clk. Tr. 33, 34; Rep. Tr. 61.] On August 12, 1958, the appellant appeared again with Paul Sweeney and secured another continuance of the trial date to September 16, 1958. Appellant himself knew that the cause was set for trial September 16, 1958. [Rep. Tr. 63, 64.] He then tried on that date to convince the court that the attorney who was not there was his attorney and that the attorney who was there was not his attorney. However, when Judge Hall indicated that Mr. Weiss would be called in for his version of the affair, in effect calling appellant's bluff, appellant admitted that Mr. Sweeney had been his attorney since June 17, 1958.

Not only does the record of the trial itself show that Paul Sweeney and appellant were ready for the trial of the case on September 16, 1958, but the colloquy between the parties at the bench on the motion for continuance proved appellant was prepared.

Although Mr. Sweeney stated that "he was totally unprepared to go to trial" and did not prepare the defense, and alleged that he was "just aware of the fact that we were going to trial Friday of last week," it was admitted that Mr. Sweeney had prepared defenses toward the overt acts in the indictment. [Rep. Tr. 6.] Further, appellant stated that he had told Mr. Sweeney "all the facts in the case" and that Sweeney had advised him of the law and as to his rights. [Rep. Tr. 64.] Also, Mr. Sweeney stated that he though appellant had been "satisfied" with his services to that point and was "confident to have me continue." [Rep. Tr. 67.] With respect to Mr. Sweeney's statement that he only knew on the Friday of the previous week that he was going to trial on September 16, 1958, the court had before it the statement of government counsel that as far as she knew, Mr. Sweeney was under the impression the previous week and sometime before that the trial would proceed on the 16th. [Rep. Tr. 8.]

No excuse whatsoever was given by attorney Sweeney or appellant as to why the matter was not brought to the court's attention before the morning of the trial, contrary to appellant's claim at page 42 of the opening brief.

The Court advised Mr. Sweeney and appellant that the "bribery" incident had "occurred long enough ago that some change in counsel should have been made by this time." [Rep. Tr. 8.]

Even if appellant had not signed the praecipe showing Paul Sweeney to be his attorney, the record is clear that Paul Sweeney was indeed his counsel. Thus the Court would have had every right in exercising his discretion by denying the continuance at that point. It is also clear that the court did not force appellant to sign the praecipe which was filed on the 16th showing Paul Sweeney to be his attorney. The court stated at the time of the inquiry, "It is up to the defendant to make up his mind." [Rep. Tr. 67.] As shown in our statement of the case this was the second time the court had made that statement to appellant. Judge Hall had asked appellant if Mr. Sweeney was his lawyer and he replied "Yes." The Court then allowed appellant the opportunity of sitting down at a table to discuss the matter with Mr. Sweeney. A few moments recess was declared for that purpose. Judge Hall stated to appellant "You make up your mind whether or not Mr. Sweeney is your lawyer." [Rep. Tr. 65, 66.] It is obvious that during that conference with his attorney, appellant must have decided that he could not fly in the face of the facts. He had an opportunity to refuse to sign the praecipe but he did not do so. He thus waived any complaint against proceeding with Paul Sweeney as his attorney.

Apparently appellant was indeed satisfied to have Mr. Sweeney proceed with the trial of the case, after his efforts to obtain another continuance failed, since there was no other counsel associated in the matter, although Mr. Sweeney indicated that he might have another attorney associated in the case the next day. Mr. Weiss did not show up, which is a further indication of the fact

that Paul Sweeney was actually appellant's attorney and was the one who was prepared for the trial of the matter.

There was no showing during the selection of the jury that any of the members of the panel had had anything to do with Paul Sweeney. Further, the jurors indicated that they would be willing to risk their own rights and liberties, or those of one near and dear to them, at the hands of a jury of men and women who felt towards appellant as they then felt toward him. [Rep. Tr. 23.]

Thus, the record of the hearing on the motion clearly shows that the court did not abuse his descretion in denying the oral motion for continuance. Further, a review of the record of the trial shows that Attorney Sweeney made a vigorous and competent defense for appellant, on cross-examination of government witnesses, during the proceedings connected with the trial and the presentation of appellant's case. Appellant was not deprived of any testimony which was necessary for his defense. A difference of opinion of present counsel for appellant on appeal as to various points of trial strategy or tactics does not detract from the fact that appellant was not deprived of the effective service of counsel. Even if it could be said that any errors were made in the representation of appellant during the heat of trial, it cannot be said that they were significant or resulted from anything involved in Sweeney's personal life. It is obvious that, in spite of his spirited representation, the *weight of the evidence* was the determining factor in the verdict of guilty on five counts which was returned by the jury.

Judge Hall was fully aware of the competency Mr. Sweeney displayed in defending appellant. He had watched,

as well as heard Sweeney during the trial and he stated that he knew of nothing that any other or additional counsel could have done for Stein that Mr. Sweeney did not do in the protection of his rights. His comments are entitled to great weight by this Court, which has only the printed record before it.

In the case of *Williams v. United States,* 203 F. 2d 85 (9 Cir., 1953), Judge Stephens of this court stated

> "the granting of a continuance is not a matter of right, but is always within the sound discretion of the court. Nor will the court's exercise of its discretion be disturbed unless it is abused to the prejudice of the complaining party. * * * The record indicates that the trial was held 13 days after the request for a continuance was denied; and there is no showing that appellant made any attempt during that time to substitute counsel. *More to the point, the record discloses a sustained, vigorous and alert defense* by appellant's attorney during the trial. There was no error in refusing to grant a continuance." (Emphasis ours.)

In *Hutson v. United States,* 238 F. 2d 157 (9th Cir., 1956), Judge Barnes of this Court cited the *Williams* case and stated: "Whatever we may think of merits of the two motions, we cannot reverse, save for an abuse of discretion."

In *Sherman v. United States,* 241 F. 2d 329 (9th Cir., 1957), this Court at page 338 held that the granting of a continuance "is a matter of discretion of the court, and will not be reviewed upon appeal in the absence of abuse." The *Williams* case was cited and quoted in that decision. The opinion went on to state "the record is devoid of any

such showing of prejudice to appellant by denial of the motion."

Judge Bone of this Court wrote in the case of *Thomas v. United States,* 252 F. 2d 182 (9th Cir., 1958) as follows:

> "The first error urged by appellant is that the trial court erred in failing to grant an early adjournment for the day when requested by appellant's counsel on grounds of his ill health. It is appellant's contention that this failure on the part of the trial court denied her effective assistance of counsel in violation of Amendment Six of the United States Constitution. * * * We find no merit in this contention.
>
> "The case of *Glasser v. United States,* 315 U. S. 60, * * * upon which appellant principally relies bases it holding as to 'Assistance of Counsel' upon a showing that *some* prejudice resulted to the defendant by the appointment of one of his attorneys to represent one of his co-defendants. It is from this basis that the Supreme Court in the *Glasser* case held that it was unnecessary for the defendant to show *exactly* wherein he was prejudiced and that any interference with the defendant's right to effective assistance in counsel is sufficient to constitute a denial of effective assistance of counsel.
>
> "There is no such showing in the case at bar. *Examination of the record shows a careful and spirited defense overwhelmed by a great quantity of evidence tending to show the guilt of appellant.* [Emphasis ours.] The defense in no way indicates that appellant's attorney was laboring under such an illness as to substantially impair his effectiveness. It has been held that without some showing in the record that the illness of counsel was of such a nature as to have effected the defense presented it will not be held to be a denial of assistance of counsel. . . . We agree."

See also:

United States v. Rosenberg, 157 Fed. Supp. 654 (U. S. D. C., Pa., 1958).

In *United States v. Yager,* 220 F. 2d 795 (7th Cir., 1955), the Court of Appeals was considering the denial of a motion for continuance. "There can be no error in denying a motion for continuance unless it is clearly shown that there has been an abuse of discretion." In that case, when it was called for trial, the defendant's attorneys moved for a continuance claiming they had been employed only an hour or two previously. The defendant had previously employed counsel who later withdrew from the case with his consent. The defendant had either six or twelve days notice of such withdrawal. The court denied the motion pointing out that there would be an adjournment after the selection of the jury and that counsel would then have opportunity to confer with the defendant. At the end of the opinion the Court remarked: "In fact, *a reading of the transcript discloses that defendant's counsel gave him vigorous representation throughout the trial period.*" (Emphasis ours.)

In *United States v. Nirenberg,* the appellant contended it was error to deny a *further* continuance. The court stated at page 634:

> "We do not agree. We hold that Judge Bruchhausen's denial of a further continuance was a sound exercise of his discretion . . . Moreover *a reading of the transcript discloses no prejudice due to lack of preparation: Mr. Hanrahan appears to have conducted a thoroughly workmanlike defense.*" (Emphasis ours.)

The attorney in that case had received two continuances in the matter. He thereafter requested another week's delay repesenting that the pressure of other trial work "had prevented the preparation necessary for this trial." The motion was denied and the case was tried a full three months after the indictment was returned.

Although the following case involved an appeal from an order denying a motion under 28 U. S. C. Section 2255 to vacate four separate judgments of conviction for narcotics offenses, it is felt that the language in the opinion is pertinent to the within case. In *Sanchez v. United States,* 256 F. 2d 73 (1 Cir., 1958) the court stated that one of the grounds for setting aside three of the four convictions was that counsel's representation of the accused was so incompetent and ineffective as to amount to a denial of counsel to which the accused is entitled under the Sixth Amendment. In affirming the order of the District Court, the Court of Appeals remarked that:

> "At the trial the counsel engaged in vigorous cross examination of the government witnesses, though probably for prudential reasons they did not put the defendant on the stand. At the conclusion of the consolidated trial the judge thanked counsel for their intelligent efforts to make the best defense that in the circumstances they could make.
>
> "These attacks upon the competency of counsel are not received with much sympathy by the court . . . Certainly the judge who presided at the trial, . . . was perfectly well aware of the services rendered by court-appointed counsel . . ."

In considering the denial of a motion for a continuance because of the illness of local counsel who had been re-

tained to represent appellant (the partner of the attorney who was ill appeared and conducted the trial in his stead) it was stated in *Franken v. United States,* 248 F. 2d 789 (4th Cir., 1957) that "as the attorney appearing in court was a trial lawyer of ability who had served as United States Attorney of the District, and as it does not appear that there was any failure to secure proofs desired by appellant or that appellant was prejudiced in any other way by the refusal of the continuance, we certainly would not be justified in awarding a new trial on that ground.

Similarly, the court in *United States v. Mathison* 238 F. 2d 358 (7th Cir., 1956), held:

> "Defendant also argues that the trial court erred in denying his motion for a continuance on the premise that there had not been sufficient time to properly prepare his defense. We have examined the circumstances regarding this contention and find it without merit. As the cases universally hold, action on such a motion is a discretionary matter with the trial court. Certainly the record does not demonstrate any abuse of discretion."

An assignment of error was made to the action of a trial court in refusing a continuance on the ground that the defendant's sole counsel was sick and absent and the court in *Hardie v. United States,* 22 F. 2d 803 (5th Cir., 1927) said in its opinion:

> ". . . it appears that Mr. Bloodworth had secured a continuance of the case on the grounds of his illness for at least six months and at least *two weeks before the trial* plaintiff in error knew Mr. Bloodworth would not be available for three or four months thereafter. Plaintiff in error had ample opportunity to secure other counsel, and did in fact

do so, and was represented by counsel on the trial. The allowance of a continuance is generally within the discretion of the trial court. There was no abuse of discretion in this case." (Emphasis supplied.)

Appellant claims that Attorney Sweeney's representation of appellant at the trial was weak, inadequate and incompetent. However, in considering the defense as a whole, Mr. Sweeney's representation was, as Judge Hall put it, skillful and adroit. Attorney Sweeney vigorously cross examined all of the government's witnesses, not only thoroughly questioning them on the events to which they testified, but he brought out all of the matters which might have affected their interest in testifying in the case. On a motion for judgment of acquittal at the end of the government's case, Mr. Sweeney succeeded in obtaining an acquittal with respect to Count 2, upon which the defendant would have been subject to another sentence of a minimum of five years or a maximum of twenty. Upon presenting his defense Mr. Sweeney was not precluded from showing the things which pertained to the defendant's case, and he did so. Present counsel for appellant has only raised one item which was mentioned during the trial but which was not received in evidence. It was a letter from the manager of the Hotel Seymour where the defendant claimed to have stayed in New York from approximately September 6 to about September 19, and Attorney Sweeney said he had hoped to receive a stipulation from the government for its introduction. Yet, the registration card from the same hotel was admitted in evidence during testimony given by appellant. The manager's testimony, if he had appeared in person, would have added little or nothing to the material which was contained

on the registration card. Anyway, it should be remembered that Duke Browning was not sure he had purchased the five ounces of heroin from appellant on September 10, but stated that it was early in September. The appellant's proof of his trip to New York was not a "complete answer to Browning's testimony" since the sale still could have been made immediately before appellant allegedly left for New York on September 5, 1958. Further, appellant also offered proof of the trip through his wife and his stepdaughter, as well as his own testimony. It could not possibly be said that the defense maneuvering on the letter was due to anything other than an attempt to put in evidence cumulative evidence which would have been extremely expensive to produce by a witness.

In attempting to pick apart Attorney Sweeney's representation, present counsel for appellant on appeal has listed various other items which prove to be only his version of how the defense should have been handled. However, as Judge Hall stated, there was very little else that Mr. Sweeney could have done in presenting the appellant's case. In considering Mr. Sweeney's representation *as a whole,* the particular points listed on appeal, in a flyspecking diversion, if we may be allowed so descriptive a phrase, add nothing to the claim that the defendant suffered prejudice as a result of Sweeney's representation. In fact some of the statements contain allegations that are remarkable in their departure from the record. For instance it is claimed that Mr. Sweeney failed to request the court to give appropriate instructions on the law relating to conspiracy, accomplices and alibis. It is to be noted that during a fairly long instruction conference in which Mr.

Sweeney participated, the subject of conspiracy was adequately discussed, the court agreeing to give certain instructions on that subject. Mr. Sweeney also requested the court to give an alibi instruction [Rep. Tr. 513-516] as well as an instruction which related to accomplice testimony, "all evidence of witnesses whose self-interest are shown to be such as may prompt testimony unfavorable to the accused should be considered with caution and weighed with great care." [Rep. Tr. 523.] Also, the court had previously stated that he would give instruction No. 12 [Rep. Tr. 511], which is shown to be the instruction on accomplices. [Clk. Tr. 44.] As a matter of fact, the instruction on the subject of accomplices was given by the court to the jury. [Rep. Tr. 611.] The court also gave an instruction on the subject of alibi. [Rep. Tr. 630.] The instructions also properly covered the subject of conspiracy. Present counsel fails to point out in what particulars he thinks any of these instructions are erroneous, thus leading one to the inference that he actually has no basis for the criticism. With respect to appellant's charge that Attorney Sweeney failed to recognize the importance of the testimony of Duke Browning, it is to be noted that Mr. Sweeney did move to strike the entire testimony of Quentin Browning, although on a different basis than set forth on Page 24 of appellant's opening brief. However, it is submitted that the grounds now proposed by a late comer to the action, would have resulted in the same ruling by the court on Attorney Sweeney's motion: "It is a question of fact for the jury in any event." [Rep. Tr. 175, 176.] It is obvious that there was sufficient testimony to go to the jury on the substantive counts and as to the length of time during

which the conspiracy continued. Although Stein and Browning had a so-called partnership or "pool" as to one particular kilo of heroin, they still continued to do business in the buying and selling of that narcotic drug up to September 1956, but on a different financial basis. Although the question of the evidence on the conspiracy count is not necessarily involved in this appeal, particularly since appellant received a concurrent sentence on that count, Attorney Sweeney did not fail to recognize the importance of the testimony that Browning gave. He may well have refrained from making a motion on the ground now proposed by present counsel because the weight of the evidence is sufficient to show that Browning and appellant continued in the conspiracy together after May, 1956.

The question of whether or not an attorney must *always* make a request for the statements which a witness who has taken the stand has previously made to the government is one which is fairly debatable. The solution of this point, like most of the others which present counsel has raised, lies normally in the exercise of sound discretion on the part of the attorney, according to the particular circumstances of each case. Although Section 3500(b) of Title 18, U. S. C. provides for the production of the statement of witnesses, it is only by motion of the defendant, who may choose not to take advantage of it. In the course of trying many cases, this writer feels warranted in stating that she has seen many able attorneys who rarely move for the production of the statements of witnesses who are on the stand. There are others who occasionally ask for such statements and there are those from whom the government can almost always expect a

demand. An obvious disadvantage to be faced is in a case where there might be no substantial material in the statements which can be used for impeachment. Many attorneys no doubt feel that in the eyes of the jury this disadvantage outweighs any small conflicts which may appear from an examination of the report.

Similarly, present counsel alleges that the fact that Attorney Sweeney did not make a motion to acquit at the close of the case is an "evidence" of incompetence. However, again there is no explanation as to how this fact could be related to the grounds which were presented as a basis for the continuance, in view of Sweeney's overall vigorous and skillful representation. Anyway, we are dealing in this appeal with the appellants right to a fair *trial.* If it could be said that the failure to make a motion to acquit at the *close* of the case was *per se* an indication of incompetence, it had nothing to do with the verdict of the jury. The only basis for making a motion here would have been to preserve the question of the sufficiency of the evidence before this appellate court. Further, the fact that a motion to acquit at the close of the case was not made, would not disallow the defendant's appeal on other grounds. It may well have been that, after having argued the original motion for judgment of acquittal before the court, and having received an unfavorable ruling, and, realizing that the weight of the government's evidence was such, the appellate court not having within its province the weighing of credibility of witnesses, as to support an adverse verdict on appeal, Sweeney believed there was no point in making a motion for judgment of acquittal. This matter, again, was entirely within the judgment of the attorney to decide which way to act.

The remaining few matters mentioned by appellant's counsel as such "evidences" are set forth briefly. With respect to Item (d) it contains a gross misstatement of an alleged government claim. Further it involves a voluntary statement by the defendant on cross examination as follows:

> "Q. Where did you meet him? A. I knew him during the bootlegging days. I have known Mr.—his name was Jimmy Byrnes—I didn't know him by Jimmy Birddog but he was the same gentleman." [Rep. Tr. 456.]

It is obvious that the government did not claim that the defendant was a bootlegger in prohibition days. At that point the court asked the defendant a couple of questions with respect to the latter's voluntary statement that he had known the above person in the bootleg days. Thus, not only was this testimony of no particular significance in the trial of the law suit, but it was opened up by the defendant's own statement. The questions asked by the court pursued the subject to very little extent and the matter was closed and not mentioned again after that time.

Item (e) at Page 23 of appellant's opening brief contains still another misstatement as to the record of the case. The government did not claim that appellant was engaged in making horse racing bets. An examination of the transcript [Rep. Tr. 460-462] shows the testimony involved related to alleged bookmaking activities of the appellant's *brother*. Also Attorney Sweeney did not fail to object to the questions asked by government counsel with respect to this subject, but *did* object to the materiality of this line of questioning. [Rep. Tr. 461.] As a

matter of fact, in ruling on the objection, the court stated

> "So it was brought out on direct. I do not see the materiality of it either way, but you opened it up and she has a right to cross examine on it.
>
> The witness is not charged with making book or betting on horses or knowing his brother or having a brother who does.
>
> Mrs. Bulgrin: Yes. That wasn't my point at all. If I may ask one more question of this subject I will leave it."

Thus, not only is Item (e) completely inaccurate but the government used the subject matter involved in a legitimate argument to the jury. [Rep. Tr. 542-545.]

Appellant claims that Attorney Sweeney failed to object to questions with respect to defendant's income and sources of income, but it is clear that the questions involved a subject which was opened up on direct examination of the defendant. The defendant testified that in 1956 and 1957 his business or occupation was that only of a used car salesman. Also appellant had testified as to the trip that he made back to New York with Evelyn Stein and her daughter. Thus the inquiry as to his occupation and to the amount of money which he realized from it appeared to be a legitimate subject for cross examination. Since the subject reasonably appeared to have been opened on direct examination of his own client, it was not absolutely incumbent on Attorney Sweeney to object to questions which were in the same field and its related aspects.

It is further alleged that another "evidence" of Mr. Sweeney's incompetence was that he failed to object

that the court's remarks with respect to a prior conviction were "too broad and prejudicial." [Rep. Tr. 452.] In view of the state of the law on this subject, it can hardly be said that the fact Mr. Sweeney did not object to the court's remarks was a mark of incompetence on his part at all. It should be kept in mind that later during the instruction conference, the court advised counsel that he was going to give instruction 23-B. [Rep. Tr. 511.] This is shown by the record to be the effect of evidence proving the prior conviction of a felony of a witness and its limitation to the question of credibility. [Clk. Tr. 48.] During the court's instructions, the jury was told that "evidence of a defendant's previous conviction of a felony is to be considered by you *only* in so far as it affects the credibility of the defendant as a witness, and must not be considered as evidence of guilt of the offense for which the defendant is on trial." [Rep. Tr. 612.] Thus, the jury was clearly instructed properly on the purpose for which the government offered evidence of prior convictions.

Further, the cases show that evidence of prior offenses is admissible for certain purposes in addition to impeachment. In appellant's own prior case reported at 166 F. 2d 851 (9th Cir., 1948), *Stein v. United States,* Judge Orr of this court stated:

> "It is urged such testimony disclosed the commission of a separate and distinct crime but appellant's argument fails to take into consideration the exceptions which permit the introduction of such evidence when its purpose is to show a system, guilty knowledge, etc."

In *United States v. Richman,* 57 Fed. Supp. 903 (D. C., W. Va. 1944) the trial court had declined to limit the defendant's admission of a prior conviction to the extent that it might affect his credibility. The judge advised the jury that it could be considered as evidence of a tendency or pre-disposition on the part of the defendant to violate the law involved in the trial. The Appellate Court reversed, quoting the rule that a conviction cannot be received simply to prove the commission of the offense on trial. However, the court stated:

> "The only exceptions to this rule which I have been able to find relate to similar offenses committed at or about the same time, which may be admitted on the question of intent, purpose, design, knowledge, motive or system."

In *Caldwell v. United States,* 78 F. 2d 282 (4th Cir., 1935) the court held that proof in the government's case of a prior conviction of the defendant 10 years previously for a similar offense to the one on trial was error, but this holding was made *only* on the ground that it was too *remote* under the cricumstances of the case. The court said:

> ". . . it is well settled that evidence of similar transactions may be admissible, under certain circumstances, as bearing upon the question of intent, purpose, design, or knowledge . . ."

Thus, again, it cannot be said that the fact that Mr. Sweeney did not object during the press of trial on such a matter would be any evidence of incompetence.

It is apparent that the present counsel for appellant has ignored the workmanlike quality of Mr. Sweeney's defense as a whole. It is obvious from a reading of the

transcript that Mr. Sweeney was well prepared to go to trial and gave appellant spirited, alert and skillful representation. He clearly did not pull his punches in giving appellant his day in court and did not let down in his representation at all.

Somewhat in the wording of the *Glasser* case, 315 U. S. 60 the government contends that present counsel for appellant is indulging in "nice calculations" as to the manner in which Mr. Sweeney represented appellant. However, our "examination of the record leads to the conclusion" Mr. Sweeney's representation of appellant was as effective as it could have been had he not been involved in the State Court incident.

(2) No Error Was Committed in Connection With the Motion for New Trial.

Rule 33 of the Federal Rules of Criminal Procedure sets forth that: "a motion for a new trial based on any other grounds shall be made *within* five days after verdict or finding of guilty . . ." In other words, it is obvious that the only requirement involved in the Rule is that the motion be made *within* the five day period and cannot be made *after* the five day period, unless the court fixes a further time during the five days. There is no provision a defendant shall have the entire five days within which to prepare his motion. It is not unreasonable for a court to fix an earlier time for the making of the motion for new trial, particularly when it appears that the court will be absent from the district for a period of time which would make it impossible to hear the motion until after the evidence would begin to fade from memory. Further, Mr. Sweeney himself suggested that the motion would have to be argued the next day.

It has been held that in absence of an abuse of discretion, an order denying a motion for new trial will not be disturbed on appeal

Fryer v. United States (1953), 207 F. 2d 134, *cert. den.,* 346 U. S. 885.

(3) The Verdict of the Jury Should Be Upheld.

Another question still preserved to appellant at this stage of the proceedings, is whether a gross miscarriage of justice has resulted, although there was no motion for judgment of acquittal made at the end of the government's case. All of the testimony must be considered in that inquiry in the light most favorable to the government.

Small v. United States, 255 F. 2d 604;

Picciurro v. United States, 250 F. 2d 585;

Knight v. United States, 213 F. 2d 699;

Corbin v. United States, 253 F. 2d 646.

It is also to be noted that the appellant was sentenced to 20 years on Count One and to 20 years on Count Three, the sentences on these two counts to run concurrently. If the sentence on either count is valid, there should be an affirmance.

Jaynes v. United States, 224 F. 2d 367 (9th Cir., 1955);

Ward v. United States, 183 F. 2d 270, *cert. den.,* 340 U. S. 864 (10th Cir., 1950).

Initially, it is not thus felt that it is necessary to discuss the ramifications of the evidence on the conspiracy count. However, the government does submit to the court that the entire verdict should stand, especially when considered under the narrow restrictions applicable at this time.

Since an agreement to do an act is distinct from the act itself and overt acts may be charged and proved as substantive offenses, it is felt that it is only necessary to comment upon Count Three of the Indictment in considering whether the first 20 year sentence should be upheld.

Pinkerton v. United States, 328 U. S. 640, 643;

Kobey v. United States, 208 F. 2d 583, 595, 596 (9th Cir., 1953).

It is hardly necessary to repeat the testimony that Browning gave which has heretofore been related in the statement of the case, but it is to be noted that Browning and appellant pooled their resources of $7000 for a kilo of heroin, which they decided to distribute together. When Stein came back from New York he had a kilo of "merchandise" with him in glassine bags. Browning testified that when he used the word "merchandise" he was talking about heroin. The two men then proceeded to "cut" one quarter of the kilo with milk sugar. Appellant told Browning that he wanted to cut it a little further because he didn't think that the people were entitled to that particular grade of "merchandise" for the price they had agreed to sell it for. All the dealings that appellant had with Browning showed that appellant was treating the substance as heroin. In fact he told Browning that it would test out close to 90% pure heroin. In addition, Browning testified that when he and Stein were cutting it, each personally used a little of the narcotic. Appellant and Browning discussed letting Clarence Winfrey have some of the "merchandise" and agreed to let him have one ounce for $350. At that particular time Browning also told appellant that he had a fellow who wanted

ten "pieces" of "stuff." Browning testified that a "piece" meant an ounce and "stuff" meant heroin. The very next day Browning saw Winfrey and took three "pieces" of "merchandise" to him for which Winfrey paid $350 in cash, and owed $700 on consignment. This was a quantity of heroin which was from the kilo of heroin that appellant had bought for $7000. Right after the time that Winfrey received the three ounces of heroin from Browning, appellant and Browning went over to Winfrey's house. Not too long after that time, according to Winfrey's testimony, Winfrey told appellant that he had something for "Duke" and Stein told Winfrey that he, Stein, would pick it up. They made arrangements to meet at Bronson and Washington. Fred Stein showed up with his brother, Bernie Stein, and Winfrey testified that he believed he gave the $700 to Fred Stein. However, it is obvious that if he had handed it to Bernie Stein it was merely for convenience and that the money got to Fred Stein.

Regardless of the appellant's denial of the testimony given by Browning and the Winfreys, the fact remains that the evidence was more than sufficient to support the verdict of guilty on Count Three of the Indictment which charges the facilitation of sale. It is clear that no gross miscarriage of justice occurred by the verdict of guilty on that count. The same is true with respect to Counts Four, Five and Six. Present counsel for appellant claims with respect to each of these counts that, in effect, there is not a word of testimony as to what the "merchandise" consisted of. However, the testimony is full of references to the language which was used by the parties involved to refer to heroin. A further indication of the fact that Fred Stein was dealing with heroin, aside from the prices

which were charged, the direct testimony as to the language used which referred to heroin and the other circumstances was the fact that Celeste Winfrey testified that she sold Matthew Beard a quantity of heroin from some *that she had obtained from appellant* shortly before that time. This quantity of heroin was in evidence at the trial and a stipulation was entered into that, in effect, it was indeed heroin.

Counsel claims that appellant was convicted solely on the testimony of Browning and the Winfreys. This testimony, if believed by the jury, would have been sufficient alone to have convicted the appellant. However it is to be noted that the testimony of the agents as to the devious nature of the dealings which appellant had with the Winfreys and with Browning late in the game corroborates the fact that he was engaged in the illicit traffic of narcotics. This is true although attempts to purchase narcotics from him under supervision did not materialize in the actual acquisition of heroin. It is not difficult to infer that Stein was fearful of making any further sales to them because he had heard of their arrests.

The appellant also offered some corroboration through his own testimony, not only through his admissions that he was acquainted with the Winfreys and with Browning and that he had met them on many of the occasions which they testified to, but also in that he testified that he did have certain discussions about narcotics with the Winfreys and with Browning.

At any event, much of appellant's argument only deals with the questions of the credibility of the witnesses which were questions for the jury. There are several mis-state-

ments made, such as the Federal officers who arrested Browning evidently promised him immunity if he would act as an informer, and that Browning selected Stein as a likely prospect upon whom to lodge the "blame" and went to work with Clarence Winfrey to accomplish his purpose, making "deals" with him and his wife. The record clearly shows them to be untrue.

Counsel for appellant has set forth certain specifications of alleged error at pages 26 to and including page 30 of the opening brief. However it is felt that these items, which are not again discussed or explained in any way in the opening brief, and appear to have been thus waived, have either been treated above or are not worthy of further consideration.

See:

Rule 18 (d), (e), Rules of Court of Appeals, Ninth Circuit;

Utley v. United States, 115 F. 2d 117 at 118 (9th Cir., 1940);

Watts v. United States, 220 F. 2d 483 (10th Cir., 1955).

In the case of *Tincher v. United States,* 11 F. 2d 18 (4th Cir., 1926) the appellant raised the "unsound" point that the sentences constituted cruel and unusual punishment. However the Court held that the sentences imposed were within the limit prescribed by statute and it is well settled that it would not be reviewed on appeal, except in the case of gross or palpable abuse.

There was certainly no abuse in sentencing the appellant to a total of 50 years. The evidence in the case, showed

that he had been dealing extensively with large quantities of heroin purely for monetary gain. Further the defendant had been convicted on three previous occasions of offenses involving narcotics. Judge Hall was entirely justified in imposing a sentence which would isolate him from the society upon which he had inflicted for so many years the results of his extensive and illicit traffic in narcotic drugs.

It is submitted the Judgment should be affirmed.

Respectfully submitted,

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